SUPREME COURT, U. S.
Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1905

DOLLAR GENERAL CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

D. L. LANSDEN
1200 American Trust Building
Nashville, Tennessee 37201
Attorney for Dollar General Corporation

Of Counsel
WALLER LANSDEN DORTCH & DAVIS
1200 American Trust Building
Nashville, Tennessee 37201

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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To the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on April 5, 1974.

CITATION TO OPINIONS BELOW

The opinion of Administrative Law Judge Eugene F. Frey finding petitioner guilty of violations of Section 8(a)(1) and (3) of the National Labor Relations Act ("the Act") in discharging three employees is printed in Appendix "A" hereto, as is the order of the National Labor Relations Board ("the Board") adopting the findings and recommended order of the Adminstra-

tive Law Judge. A summary and digest of the decision of the Administrative Law Judge as adopted by the Board is reported at 204 NLRB No. 106, 83 LRRM 1713.

The order of the United States Court of Appeals for the Sixth Circuit ("the Court of Appeals") enforcing the order of the Board is printed in Appendix "A" hereto, and is unreported.

The order of the Court of Appeals entered May 2, 1974 denying petitioner's petition to rehear is printed in Appendix "A" hereto, and is unreported.

JURISDICTION

The judgment of the Court of Appeals was made and entered on April 5, 1974. Petitioner's Petition for Rehearing was denied on May 2, 1974. On May 7, 1974, petitioner filed a motion to stay the mandate of the Court of Appeals pending application to this Court for a writ of certiorari. The Court of Appeals had taken no action on that motion as of the date of printing of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 *et seq.* The constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution. The pertinent portions of the statutes and constitutional provisions are reprinted in Appendix "B" hereto.

QUESTIONS PRESENTED

I

Whether it is an unfair labor practice for an employer whose employees are not represented by a union, when ordered in an unfair labor practice case to rehire individuals previously discharged, to discharge employees not known by it to be either members or nonmembers of any union to make room for the individuals it is required to rehire.

II

Whether an employer whose employees are not represented by a union and which is found guilty of discrimination in the discharge of union members, is *prima facie* guilty of discrimination in any subsequent discharge of a union member.

III

Whether an employer must show good cause for discharging employees who claim to have been discharged in violation of Section 8(a) (1) and (3) of the National Labor Relations Act.

IV

Whether there is any evidence in the record to support the finding that the discharge of the three employees, Marvin Billingsley, O. J. Hurt and Kenneth Isenberg violated Sections 8 (a)(1) and (3) of the National Labor Relations Act.

V

Whether an employer petitioning the Court of Appeals for review of an order of the Board is deprived of the right to review provided by Section 10(f) of the National Labor Rela-

tions Act as well as of the basic requirements of due process of law as guaranteed by the Fourteenth Amendment, if the Court of Appeals orders enforcement solely on the basis of the facts involved in a previous unfair labor practice case.

STATEMENT

This action grows out of an alleged unfair labor practice on the part of petitioner, Dollar General Corporation ("the Company"), in discharging three truck drivers to make room for three other drivers which the Board ordered it to rehire.

The case was tried before Administrative Law Judge Eugene F. Frey on November 14, 1972, in Scottsville, Kentucky pursuant to a charge filed on July 12, 1972 and a complaint filed on August 31, 1972. The complaint alleged that the Company discharged three employees, Marvin Billingsley, Otis J. Hurt, Jr. and Kenneth C. Isenberg in violation of Section 8(a)(1) and (3) of the Act (Billingsley, Hurt and Isenberg are referred to hereafter for convenience as "the Charging Parties", although, in fact, only Billingsley filed a charge). The relevant facts as developed at the hearing before the Administrative Law Judge are as follows. References in parentheses are to the record as printed in the Appendix filed with the Court of Appeals.

The Company is a Kentucky corporation engaged in wholesale and retail merchandising of clothing and other dry goods with its principal offices and warehouses in Scottsville, Kentucky. The Charging Parties were each employed as truck drivers by the Company prior to their discharge on July 5, 1972.

It is a subject for judicial notice that on June 1, 1971, the Court of Appeals, in Case No. 71-1984 ordered enforcement of an order of the Board, 189 NLRB No. 41, directing the Company to offer reinstatement to five employees to their former or substantially equivalent positions with the Company. It

was stipulated that the Company complied with the order by offering reinstatement to those employees, but that all of them did not accept jobs (A. 42-43). Since three of these men accepted jobs as truck drivers, it was necessary for the Company to discharge three truck drivers to create positions for the three rehired, and the Charging Parties were chosen as the three to be discharged (A. 70-71).

The vice-president of the Company, Cal Turner, Jr., testified that he made the decision which truck drivers would be terminated (A. 70); that the Company had no rules of seniority with respect to discharge or layoff of employees (A. 71); and that although all his drivers were satisfactory, he chose to discharge the Charging Parties because of their poor attitude since being laid off for lack of work in December of 1971 (A. 71). Mr. Turner did not know at the time of any union activity on the part of the Charging Parties, and he did not mention any union activity in his discussion of their discharge with other Company officers (A. 71-72).

Mr. Turner's account of the reason for choosing the Charging Parties as the Drivers to be discharged is supported by the testimony of the Company's personnel director (A. 36). His statement that the Company had no seniority rules with respect to firing and layoffs for lack of work is supported by the testimony of the Company's president (A. 33-34).

All three of the Charging Parties testified that they joined the union in November of 1971 (A. 43, 53, 62), but none of the three knew whether the Company knew they had joined a union (A. 47, 59-60, 66-67). In fact, the only union activity engaged in by the Charging Parties which they testified the Company knew about was the attendance by two of them at a meeting in November of 1969, almost three years prior to their discharge, which Billingsley testified was observed by some officer of the Company (A. 47-48).

Although the General Counsel made no such allegation in his complaint, it was his theory that the reason for the Charging Parties' layoff in December of 1971 was their union activity (A. 37). There is nothing in the record to support this position, however. The Charging Parties were laid off for lack of work in December of 1971, and were chosen by drawing names out of a hat (A. 44, 73). The month of December was a slow period for the Company (A. 73), and management was having to run a tighter ship because more than 50% of its stock had become publicly owned the previous May (A. 74). Complaining Parties were reinstated in February (A. 50, 51), so either the Company was then unaware of their union activity or did not care. Furthermore, Billingsley was careful to state that he was not testifying that he was laid off in December of 1971 because of union activity (A. 48), and the General Counsel declined to pursue this theory in direct examination of the two other Charging Parties.

The Company hired no new truck driver between the time Complaining Parties were discharged on July 5, 1972 and the time the charge was filed, July 12, 1972 (A. 49-52).

Although he testified that he had never received a reprimand or warning while working for the company (A. 45), Billingsley had received reprimands in April and August of 1970 for driving an unlawful number of hours and for failing to turn in log sheets, and was warned that any further violation would result in discharge. He had also been guilty of a speeding violation in May of 1970 (A. 67-68).

By decision dated March 14, 1973, the Administrative Law Judge found that the three employees were discharged because of continued adherence to and activity on behalf of a union, and that by such discharges the Company coerced the employees in exercise of rights guaranteed to them by Section 7 of the Act and discriminated in regard to the hire and tenure of em-

ployees in order to discourage membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act. The Company filed exceptions to the Administrative Law Judge's decision with the Board on April 23, 1973, and on June 24, 1973, the Board issued its Decision and Order affirming the decision of the Administrative Law Judge and adopting his recommended order.

On July 25, 1973 the Company petitioned the Court of Appeals pursuant to Section 10(f) of the Act, 15 U.S.C. Sec. 160 (f) for review of the Board's order, and thereafter the Board filed a cross-application for enforcement of the order. On April 5, 1974, the Court of Appeals ordered enforcement of the Board's order. It is that decision which the Company now petitions this Court to review.

REASONS FOR GRANTING THE WRIT

I

The decision below should be reviewed because it involves a question important to the administration of the Act which has not been but should be decided by this Court. *N.L.R.B. v. United Steelworkers of America, C.I.O.*, 357 US 357, 359 (1958); *N.L.R.B. v. District 50, United Mine Workers of America*, 355 US 453, 458 (1958).

Implicit in the Court of Appeals' decision granting enforcement of the Board's order is a ruling that an employer found to have discriminated in the discharge of employees, and ordered to rehire the employees discharged, will be *prima facie* guilty of an additional unfair labor practice if it discharges employees to make room for those it is obliged to rehire. The decision and order enforced by the Court of Appeals found that a *prima facie* case had been made out against the Company, based solely upon these factors:

> "Respondent's past illegal conduct including discharge of union organizers also warrants the inference that its strong dislike of unions and union or concerted activity of its employees has continued. These circumstances plus the timing of discharge of the 3 drivers within a month after Respondent received notice of court enforcement of the Board Order in the prior case suffice to make a *prima facie* case of discriminatory discharge which requires Respondent to adduce evidence of economic need for the discharges and nondiscriminatory choice of the three which is adequate to rebut the case." Appendix "A", p. 19.

This interpretation of the law obviously places an employer in an unfair labor practice proceeding in an untenable position when, as frequently occurs, it is ordered to rehire employees for whom

no jobs are currently available. The decision thus raises a serious question as to the proper method of compliance with Board orders and enforcement orders, and should, therefore, be reviewed by this Court.

II

The decision below should be reviewed because it so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, because the Court of Appeals clearly confused the facts involved in this case with the facts involved in an entirely different case it had previously decided.

The following recitation appears in the court's order of April 5. 1974:

> "In two prior cases, the Board found that the company had committed unfair labor practices at the Scottsville location. 189 NLRB 301.
>
> In September 1969, three months after the last discharge for union activities, the company drivers began to discuss union organization. The company responded by interrogating them about these meetings, and warning them they would be fired if they did not stop their organizational activities. Shortly after the three drivers were discharged, the Board found that the discharge of the three employees violated Sec. 8(a)(1) of the Act by coercing the employees in their statutory right to self organization, and violated Sec. 8(a)(3) of the Act by discriminating in employment in employment (sic) in order to discourage membership in a labor organization." Appendix "A", p. 37.

No other recitation of salient facts appears in the order, so it is assumed that such were the facts upon which the court relied in rendering its opinion. These facts, however, were not involved in the present case, but have to do with the earlier

unfair labor practice case involving the Company wherein the Court of Appeals enforced the order of the Board directing reinstatement of five employees. The Company complied with the order of the court and offered the five employment, but only three returned to work. The three who returned were truck drivers and this resulted in the company's having three more truck drivers than it had trucks. It was, therefore, necessary to discharge Marvin Billingsley, Otis J. Hurt and Kenneth C. Isenberg, the employees involved in the present case, to make room for the three who returned.

The present case does not involve any union activity, interrogations about union activity, threats of discharge, or discharges taking place in 1969. It involves the discharge of three employees in June of 1972 to make room for those ordered rehired by the Court of Appeals in a previous case. The National Labor Relations Board contended in this case that the Company chose the three employees discharged in June of 1972 because they were union activists, while the Company contends that it did not choose them because of union activity, and did not even know they were union activists. The Court of Appeals clearly based its enforcement order on facts having nothing to do with the present case. The Company has, therefore, been deprived of its right to review as provided by Section 10(f) of the Act, 15 USC 160(f), and has not been accorded due process of law as required by the Fifth Amendment to the United States Constitution.

III

The decision below should be reviewed because it conflicts with this Court's decision in *NLRB v. Brown*, 380 US278, 291 (1965) in that it enforces the Board's decision and order that the Company was unlawfully motivated in discharging its employees, while the record, taken as a whole, does not present a substantial basis of believable evidence pointing toward unlaw-

ful motivation. The decision also conflicts with numerous decisions by other courts of appeal, as well as earlier decisions by the Sixth Circuit, pertaining to burden of proof and the necessity of proving anti-union motivation in each unfair labor practice case.

The Administrative Law Judge, whose decision was adopted by the Board, formulated the issue in this case as whether the Company "discharged 3 employees for cause or thereby discriminated against them in violation of Section 8(a)(3) and (1)". (A. 8). This statement of the issue in an unfair labor practice case based upon allegations of discriminatory discharge is erroneous because it necessarily places the burden of proof upon the employer to show that the discharge was for cause. An employer has the right to discharge an employee for any reason, whether it is just or not, as long as the discharge is not in retaliation for union activities or support. *NLRB v. Latex Industries, Inc.*, 307 F2d 737, 739 (6th Cir. 1962); *Fort Smith Broadcasting Co. v. NLRB*, 341 F2d 874, 879 (8th Cir. 1965). Furthermore, it is well settled that the General Counsel has the burden of proving by substantial evidence that the employer was improperly motivated in discharging an employee. *NLRB v. Winn-Dixie Stores, Inc.*, 410 F2d 1119, 1121 (5th Cir. 1969). The employer does not have the duty of sustaining the burden of providing sufficient explanation for the discharge of a particular employee, but rather the General Counsel has the duty to establish by acceptable substantial evidence on the whole record that the discharge was due to improper motives. *NLRB v. McGahey*, 233 F2d 406 (5th Cir. 1956).

It is true that the Administrative Law Judge found and concluded that the General Counsel made out a *prima facie* case of discriminatory discharge (A. 14) but it is clear that such finding and conclusion were in error, and were based entirely upon a finding of discriminatory discharge in a previous case, and upon matters so remote in time as to be immaterial to the

instant case. The Administrative Law Judge first concluded that since two of the Charging Parties had openly attended a union organizational meeting in November of 1969 and the Company was found in an earlier case to have illegally discharged five other drivers who attended that meeting, the Company knew that the two Charging Parties also attended the meeting (A. 13). Such an inference is manifestly unjustified. If the Company knew that the two charging parties had attended the meeting and fired five others for attending the meeting, why did it spare the Charging Parties until three years later? Furthermore, the attendance of the Charging Parties at a meeting in November of 1969 is much too remote to be material to their discharges in July of 1972, and may not be made the basis of an inference of illegal motivation three years later where such testimony "serves to cloak with illegality that which is otherwise lawful." *Metropolitan Life Insurance Company v. NLRB*, 371 F2d 573, 580 (6th Cir. 1967) (involving testimony as to events only six months prior to discharge). Nor is the General Counsel's burden of proof sustained by showing that the employer has been convicted of an earlier violation of the Act or was at one time hostile to the union. *Metropolitan Life Insurance Company v. NLRB, supra.*

The Administrative Law Judge, however, found that the Company's past illegal conduct justified an inference that the Company's strong dislike of unions has continued and that such dislike of unions, coupled with *the timing of the discharges within a month after it received notice of Court enforcement of the Board Order in the previous case* (obliging the Company to rehire employees previously discharged), made out a *prima facie* case of discrimination (A. 14). In relying upon the *timing* of the discharges as evidence of discrimination, the Administrative Law Judge ignored the fact that such timing was dictated by Court enforcement of the Board Order in the previous case. Thus, it is apparent that his finding of a *prima facie* case of discriminatory discharge assumes that the discharges were

motivated by discrimination, and assumes the company did *not* discharge the three to make room for those it had to rehire under the Board's order. Such circular reasoning is a clear indication that in the mind of the Administrative Law Judge, the Company had the burden of justifying its discharge of the Charging Parties. It is settled law, however, that the burden of proof never shifts to the employer. *NLRB v. Howard Quarries*, 362 F2d 236, 241 (8th Cir. 1966).

Proof of the Company's knowledge of the Charging Parties' union activity was essential to prove that their discharge was discriminatory. *Television Broadcaster's, Inc. v. NLRB*, 398 F2d 319, 320 (5th Cir. 1968). The Company's Vice-President, who made the decision to discharge the Charging Parties, gave uncontradicted testimony that he was not aware of any union activity on their parts, and that the December layoff and July discharge were motivated by good faith economic considerations. His sworn testimony is not to be "arbitrarily disregarded." *NLRB v. Atlanta Coca-Cola Bottling Company*, 293 F2d 300, 306 (5th Cir. 1961).

The Administrative Law Judge partially based his finding and conclusion that Respondent knew of the Charging Parties' identity as union activists upon the small size of the work force and the town of Scottsville (T. 13-14). This is not sufficient to show knowledge of union activity. A finding of knowledge by an employer of a dischargee's union membership cannot be based upon mere suspicion or surmise. *NLRB v. Shen-Valley Meat Packers*, 211 F2d 289, 292 (4th Cir. 1954); in that case, the Court found that there was insufficient evidence to establish knowledge of the discharged employees' union activity where they had attended two organizational meetings and were members of the union negotiating committee. The mere fact of the Charging Parties' union activity in this case is insufficient to establish the Company's knowledge thereof.

It should be pointed out here that if, as the Administrative Law Judge found, the Company knew "at all times" (A. 14) of the Charging Parties' union activities, it knew of such activities when it laid off the Charging Parties in December of 1971 and put them back to work in early 1972. Yet the Administrative Law Judge specifically found that the December layoff was for good faith economic reasons and was not motivated by discriminatory considerations (A. 14-15). There is nothing in the record to distinguish between the defendant's proper motivation in laying off the Charging Parties in December and its supposedly discriminatory motivation in discharging them the following July.

It is clear that the Administrative Law Judge's finding and conclusion that the General Counsel had made out a *prima facie* case of discrimination were based upon nothing more substantial than the finding of anti-union motivation for the discharges in the previous case (A. 14). Anti-union motivation must be established with respect to each discharge, and a general bias or a general hostility does not supply the element of purpose. *NLRB v. Atlanta Coca-Cola Bottling Company, supra,* at 303, 304 (5th Cir. 1961); *Dan River Mills, Inc. v. NLRB,* 274 F2d 381, 384 (5th Cir. 1960); *NLRB v. Mt. Vernon Telephone,* 352 F2d 977, 981 (6th Cir. 1965). Previous convictions of an employer for violations of the National Labor Relations Act do not so taint it as to allow suspicion to suffice as proof when the employer again is charged with a violation. *NLRB v. Murray of Ohio Manufacturing Company,* 326 F2d 509, 515 (6th Cir. 1964).

Even assuming the Company's anti-union animus and knowledge of Charging Parties' union activities, these alone would not be sufficient to sustain the charge of discriminatory discharge. *NLRB v. Winn-Dixie Stores, Inc., supra,* at 1120.

Having found that the General Counsel had made out a *prima facie* case of discrimination, the Administrative Law

Judge found and concluded that the Company failed to adduce evidence of economic need for the discharges and nondiscriminatory choice of the Charging Parties for discharge. The Company adduced testimony that it had to discharge three employees to make room for those it was obliged to rehire. This testimony was uncontradicted and not one of the Charging Parties testified or contended that, at the time they were discharged, the Company had more trucks than drivers. Nonetheless, the Administrative Law Judge, through a complex series of inferences, somehow managed to find and conclude that since the Company had 23 drivers as of February 1, 1972, it had 23 operational trucks as of the date of Charging Parties' discharge in July, making it necessary for only two drivers to be discharged to make room for those ordered to be rehired in the previous case (A. 15). There was no evidence in the record as to the number of trucks in the Company's fleet on any day. Yet, the Administrative Law Judge justified his groundless and illogical inferences upon the Company's failure to show the number of trucks out of service for repairs or maintenance at any given time. Surely, by adducing uncontradicted testimony that it had three more drivers than it had trucks, the Company met any burden it might have had of "going forward" with the evidence on this issue.

The Administrative Law Judge placed great reliance upon the fact that the Company hired a new driver, Morris, on June 19, since, as he assumes, the Company must have known it would have to take back the drivers ordered reinstated in the previous case. While the Company knew it would have to offer jobs to the men ordered reinstated, it could not have known on that date whether all or any of them would take the jobs offered. The Administrative Law Judge also placed great reliance upon the supposed need for more drivers as shown by the death of one driver on July 27 and the termination of another on August 3 and the quitting of another on September 1. (A. 15). It is difficult to see the materiality of

this information inasmuch as Charging Parties were discharged on July 7 and the charge in this case was filed July 12. Certainly the Company's refusal to rehire them after the unfair labor practice charge was pending is not probative of anything.

The Administrative Law Judge found that the Company's case was even "weaker" with respect to the choice of the Charging Parties for discharge, and appeared to premise that finding chiefly upon the Company's failure to produce Warehouse Manager Jim Polston to spell out the "negative attitude" of the Charging Parties (A. 17). However, Cal Turner, Jr. testified that the Charging Parties were discharged because of their negative attitude since being laid off the previous December (A. 71). Since the Charging Parties were otherwise satisfactory employees, presumably their negativism was apparent only in their attitude or bearing. The General Counsel was apparently satisfied not to pursue just why Turner felt their attitude was negative, since he did not go into it on cross-examination. The Administrative Law Judge found that the December layoff was for valid business reasons, and that the Charging Parties were chosen by drawing names out of a hat (A. 15). Nothing could be more natural than that these men would resent being laid off during the holiday season, and that this resentfulness would manifest itself in their being less happy with their employer and with their jobs. To require further explanation from the Company was error, since to do so placed the burden of proof upon the Company to show the validity of their discharge. To find that they were chosen for their union activity which—if they are to be believed—had been going on since November of 1969, is to reject without justification an obvious and natural explanation showing valid motivation to adopt an explanation which simply cannot be reconciled with the Administrative Law Judge's own finding and conclusion that the December layoff was validly motivated. There is no evidence the Company knew that there was union

activity between the December 1 layoff for lack of work and the July discharge.

Even though he found that the Company had never pursued a policy of discharge according to seniority (A. 15), the Administrative Law Judge found that seniority was a factor in work assignments (A. 17). Even if true, such policy was certainly immaterial, since no discrimination with respect to job assignments was ever alleged. The Administrative Law Judge also found, from the testimony of Charging Parties, that the Company had a policy of considering longevity in assigning new trucks, even though he also found that the Company assigned its newest driver, Morris, to a new truck (A. 17-18). The Administrative Law Judge took the Company to task for failing to explain why Morris was assigned to a new truck, even though it was the Company's position that it had no policy of seniority with respect to job assignments and the charge is not based on job or truck assignments. (A. 18).

The Administrative Law Judge found that the Company's reliance in argument upon Billingsley's receipt of two reprimands in 1970 for violations was a factor weighing against the credibility of the claim of discharge for cause since such reprimands were "remote or obviously irrelevant" (A. 18). In the first place, this finding was error because the Company introduced these reprimands to show that Billingsley lied under oath when he testified that he had never received any reprimands (A. 45). In the second place, the 1970 reprimands were certainly no more remote or irrelevant than Charging Parties' attendance at a union meeting in 1969. Such a finding was thus unwarranted and demonstrates the Administrative Trial Judge's misconception of burden of proof in this case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted

D. L. LANSDEN

AMES DAVIS
Attorneys for Petitioner

Of Counsel

WALLER LANSDEN DORTCH & DAVIS
1200 American Trust Building
Nashville, Tennessee 37201

APPENDIX A

JD-180-73
Scottsville, Ky.

United States of America
Before the National Labor Relations Board
Division of Judges
Washington, D. C.

Dollar General Corporation and Marvin Billingsley, an Individual	Case No. 9-CA-7168

Wayne E. Natale, Esq., for the General Counsel.

Walker, Landsden, Dortach & Davis, by D. L. Lansden, Esq., and Ames Davis, Esq., all of Nashville, Tenn., for Respondent.

Mr. Marvin Billingsley, of Fountain Run, Ky., appearing in person.

DECISION

(Filed March 14, 1973)

Statement of the Case

Eugene F. Frey, Administrative Law Judge: This case was tried before me, on due notice, on November 14, 1972, at Scottsville, Kentucky, with General Counsel and Respondent, Dollar General Corporation, appearing by counsel, and Marvin Billingsley appearing in person, after pre-trial proceedings in

compliance with the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (herein called the Act). The issue in the case is whether Respondent discharged 3 employees for cause, or thereby discriminated against them in violation of Section 8(a)(3) and (1) of the Act because they engaged in activities on behalf of District No. 53, International Association of Machinists and Aerospace Workers, AFL-CIO, or General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Unions).[1]

At the close of the testimony all parties waived oral argument, but General Counsel and Respondent filed written briefs on December 11, 1972, which have been carefully considered in the preparation of this Decision. A motion of Respondent at close of the testimony for dismissal of the complaint on the merits is now denied on the basis of the findings and conclusions set forth herein. This decision was signed and released by me on March 7, 1973, for distribution to the parties in the usual course.

Upon the entire record in the case, observation of the witnesses and their demeanor on the stand, and consideration of the arguments of counsel, I make the following:

Findings of Fact

I. Respondent's Business and the Unions Involved

Respondent is a Kentucky corporation engaged in the warehousing and distribution of merchandise through a plant and

[1] The issues arise on a complaint issued August 31, 1972, by the Board's Regional Director for Region 9, after Board investigation of a charge filed by Billingsley on July 12, 1972, and answer of Respondent admitting jurisdiction but denying the commission of any unfair labor practice.

store in Scottsville, Kentucky, the only facility involved in this case. In the calendar year 1971 Respondent had a direct outflow of goods and products from the Scottsville facility valued in excess of $50,000. Respondent admits, and I find, that it is and has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[2]

Each of the Unions named above is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. **The Discharges and Background Events**

In 1969 in Case No. 9-CA-5247, a Trial Examiner of the Board found that an office employee of Respondent had been unlawfully discharged by President Cal Turner, Sr. because she had talked critically about Respondent's wage rates in presence of a union agent.[3] The decision of the Trial Examiner became the Decision of the Board by order of March 3, 1970, for lack of exceptions to the decision of the Trial Examiner.

In a Decision and Order issued March 25, 1971, the Board found that Respondent had violated Section 8(a)(3) and (1) of the Act by interrogation of and threats to employees, and surveillance of a drivers' organizing meeting on November 30, 1969, at a Tabernacle on the outskirts of Scottsville by Wayne Dugas, a supervisor of Respondent, and discharge of 5 employees (Mitchell Lewis, Plymouth Eaton, Tommie Jones, Billy Landrum and Billy Word), who had been active organizers for

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[2] The Board has previously taken jurisdiction of Respondent's Scottsville operation in two cases noted below.

[3] Respondent admits that its President, Cal Turner, Sr., Vice-President Cal Turner, Jr., Personnel Director Tim W. Turner, and Dispatcher Ray Garrison, are agents of Respondent and supervisors within the meaning of the Act.

the Machinists Union herein in its organizing drive of 1969. These 5 as well as drivers Marvin Billingsley, Shelby Lawson, and Kenneth C. Isenberg were openly present at the November 30 Tabernacle meeting observed by Dugas. The Board Order aforesaid was enforced by the United States Court of Appeals for the Sixth Circuit on June 1, 1972 thus in pertinent part requiring Respondent to offer immediate reinstatement to the 5 employees named above. Respondent received notice of the Court's decision in due course shortly after June 1, 1972.[4]

In November, 1971, driver Otis J. Hurt, Jr. initiated another drive for membership in the Teamsters Union by securing the usual authorization cards and soliciting other employees to sign them, at their homes, in public restaurants in and near Scottsville, and also on company property. He secured signed cards from 14-15 out of about 20 drivers. He signed a card November 13, 1971. Billingsley and Isenberg signed cards for him at their respective homes in the same month.

On December 20, 1971, Hurt, Billingsley, Isenberg, and Shelby Lawson were temporarily laid off by then warehouse supervisor Jimmie Polston for lack of work. When they asked why they had been chosen for layoff, he answered that names of all drivers had been put in a hat, and theirs were drawn. Hurt was recalled to work February 14, 1972, Billingsley was recalled February 24, 1972 and Lawson and Isenberg on January 20, 1972. After recall, Hurt, Billingsley and Isenberg continued actively to urge drivers to join the Teamsters Union, in talks in the plant and at restaurants usually patronized by Respondent's employees. There is no proof that Lawson did the same; he quit Respondent's employ May 24, 1972.

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[4] The above facts are found from the Board proceedings culminating in its Decision and Order reported in 189 NLRB No. 41, of which I take judicial notice, stipulated facts and credited testimony of Billingsley and Isenberg.

After Respondent received official notice in June, 1972, of the Court decision requiring reinstatement of Lewis, Eaton, Jones, Landrum and Word, it took steps to reinstate Word, Lewis and Eaton,[3] and they were put back to work as drivers on July 3, 1972. Prior to that, Respondent had consulted counsel about its right to release other drivers to create the necessary vacancies for the 3 discriminatees, as it claimed it did not have trucks enough for use of its present driver force plus those 3. Counsel advised executive vice-president Cal Turner, Jr. that Respondent could legally discharge its 3 least desirable drivers to make room for the 3 discriminatees. Turner then discussed the selection of drivers with Polston and Personnel Director Tim W. Turner, because he felt that all present drivers were generally satisfactory employees, the only factor differentiating employees was the layoff of Billingsley, Hurt and Isenberg in December, 1971, and their alleged "negative attitude" in their work after recall. Turner says Polston chose these 3 for discharge, telling Turner he "drew their names out of a hat." However, Turner, Jr. and Tim W. Turner testified that Turner, Jr. accepted this choice and discharged them because of their "negative attitude."

On July 7, 1972, Tim W. Turner called Hurt and Isenberg to his office, gave each a discharge letter, telling them to read it, and saying that the letter explained itself, and that "we will take it from there." The letters were identical in terms except name of the addressee, and read as follows:

> This week the National Labor Relations Board's order that Pete Lewis, Plymouth Eaton and Billy Word be reinstated to their former positions in our company has been enforced (Billy Landrum has elected not to be reinstated and Tommie Jones is being reinstated to his former warehouse job). Because of this action by the Labor Board, the company is now terminating your job.

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[3] Jones and Landrum refused the offer of reinstatement.

> The ruling that three drivers be reinstated leaves us with no alternative but to terminate three other drivers.
>
> You will be given one week severance pay and are further offered any assistance we can give in finding employment.
>
> Yours very truly,
>
> DOLLAR GENERAL CORPORATION
> TIM W. TURNER
> Personnel Director

The letters to Hurt and Billingsley also contained identical postscripts, saying:

> P.S. Please come by my office Saturday, July 8, at 9:00 and we will take care of your severance pay and other business concerning your dismissal. We will also offer any assistance possible to you. If this time is not convenient for you, please contact me by phone.
>
> TWT

Turner also told each that he would help them to get other jobs by showing their employment files to other employers who asked for information about them. When both men asked why they were chosen for discharge, Turner replied that it was a decision of Respondent, reached after discussing it with counsel and receiving advice that the discharges of them were legal. Turner added that their work was satisfactory, but Respondent was compelled to discharge them to make room for the 3 drivers it had to reinstate.

Billingsley came in from vacation leave that afternoon to see Turner, at the request of the truck dispatcher. The same conversation occurred as between Turner and the other 2.

None of the 3 discharged drivers have been recalled or offered reinstatement; Turner's offer to help them by recommendations for other employment makes it clear that Respondent was not interested in recalling them.

B. The Contentions of the Parties, and Final Conclusions

General Counsel contends that Respondent's prior unfair labor practices show it has long displayed a union animus and a desire to get rid of employees who engage in union or concerted activities, and that it implemented that attitude in 1972 by using Board and Court orders for reinstatement of three drivers as the pretext to get rid of three more known union adherents. His contention rests on two theories: (1) Respondent's economic situation in June, 1972, and later did not in fact require discharge of three drivers to make vacancies for those to be reinstated, because the record shows a turnover of drivers about this time and expansion of the driver force thereafter; and (2) even if the economic situation warranted release of three drivers to make room for those reinstated, Respondent chose Billingsley, Hurt and Isenberg, all workers with long and satisfactory service, only because of their known past and recent union activities. Respondent, of course, argues the converse of these propositions.

As 2 of the 3 discharged drivers had openly attended a meeting of drivers on November 30, 1969, which was under illegal surveillance by Respondent's supervisor, and Respondent thereafter illegally discharged five other drivers who attended that meeting, as found by the Board in the prior case, I must infer that Respondent was well aware of the presence of Billingsley and Isenberg at the meeting. As these 2 and Hurt actively and without apparent attempts at secrecy solicited for the Teamsters Local after their layoff of December, 1971, in a new organizing campaign initiated by Hurt in November 1971, I am convinced and find that Respondent was aware of their continued activity.[6] Respondent's past illegal conduct including

[6] The Board's prior finding that Respondent had continually tried by coercive surveillance, interrogation, threats and warnings to dissuade employees from attending union meetings or engage in other union activity shows that it took active and illegal steps

discharge of union organizers also warrants the inference that its strong dislike of unions and union or concerted activity of its employees has continued. These circumstances plus the timing of discharge of the 3 drivers within a month after Respondent received notice of court enforcement of the Board Order in the prior case suffice to make a *prima facie* case of discriminatory discharge which requires Respondent to adduce evidence of economic need for the discharges and nondiscriminatory choice of the three which is adequate to rebut that case.[7]

The only testimony on the alleged need to get rid of 3 drivers to comply with the Board Order comes from Executive Vice President Turner, Jr., who said that when Respondent received notice that it had to reinstate 3 drivers, it found it would then have 3 more drivers than trucks to be driven, so it had to get rid of 3 current drivers. Company records show that on June 1, 1972, it had 20 drivers on the payroll presumably with 1 truck assigned to each, or 20 trucks operating at all times; there is no proof from any source that several

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to keep abreast of the identity and union activity of union adherents among its drivers and to discourage such activity by discharging active union adherents. When the 1971-1972 union campaign was conducted without secrecy and resulted in at least 14 out of the small force of about 20 drivers signing with the Teamsters, there is a strong inference that word of the campaign and its progress spread very quickly in the small facility and work force and that Respondent was at all times aware of it and of the identity of Hurt as the leader and of Billingsley and Isenberg as active union adherents. I also take note of the fact that Scottsville is a small country town of only about 3300 population. See *Dubin-Haskell Lining Corp.*, 154 NLRB 641, 650; *The Circle K Corporation*, 173 NLRB 713, 715. I do not credit testimony of company officers denying any knowledge of the union activities of Billingsley, Hurt and Isenberg.

[7] I place no reliance on the choice of Billingsley, Hurt and Isenberg for layoff in December 1971, in reaching this conclusion. Credible testimony of Turner, Jr., indicates that: December is usually a slow month in Respondent's business, and although the 1971 layoff was the first in its history, the fact that Respondent became publicly-owned late in 1968, with greater pressure from stockholders to run its business more efficiently, played some part

drivers operated the same truck in rotation, as on different shifts, or that some drivers were held in reserve, as "spares," or to handle another driver's truck if he was absent for illness, on vacation, or other good reason. However, company records show that in 1972 up to the time of trial, there was some turnover among drivers. Thus one of the 20, Joe Lee Garner, was hired in March, William Logsdon quit in February, and Shelby Lawson quit in May. Willie James Morris was hired in June, possibly to take the place of Logsdon or Lawson, but apparently no one filled the other vacancy. Hence as of February 1, for example, Respondent had 23 drivers presumably driving 23 separate trucks. By June 1, the force was down to 21, with the quitting of Lawson and Logsdon, leaving two idle trucks. Hiring of Morris June 19 accounted for only one truck. There is no proof from Respondent of any slack in business at that time, nor any showing of the number of trucks out of service for repairs, maintenance on average or at any crucial time. One truck without a driver on or after June 1 would seem to call for the discharge of only two, not three, drivers on July 3. The availability of more trucks, with need for more drivers thereafter, is shown by the death of Aubrey N. Austin July 27, the termination of John R. Foster August 3, and quitting of a reinstated driver, Mitchell A. Lewis, on September 1. The hiring of a new man, Jerry D. Ethridge, on August 14, may have returned one of these three trucks to operation, but Respondent does not account for the presumed idleness of the other two by showing any slump in business or truck use or other good economic reason. To the contrary, the hiring of

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in making that layoff. The above drivers were chosen for layoff by random choice (drawing names from a hat) because Respondent has never followed a policy of discharge or layoff according to seniority. When business picked up in January and February, the three were recalled to work. Billingsley specifically disclaimed any contention that he was illegally chosen for layoff in December, 1971; General Counsel did not question the other two on this point. These circumstances militate against any inference that the 1971 layoff was other than economic, or that the three chosen from discriminatory considerations.

Morris on June 19, after Respondent knew it would have to take back Eaton, Lewis and Word, argues against any drop-off in business or need for drivers. Hence, the record as made tends to show that Respondent had need (by number of usable trucks) for 2 or 3 more drivers, besides those reinstated, in July, August and on September 1. In short, Respondent has not adduced cogent proof that it lacked sufficient business or need for trucks to warrant the retention of the 3 dischargees after reinstatement of Eaton, Word and Lewis.

On the issue of the choice of Billingsley, Hurt and Isenberg for layoff, Respondent's case is even weaker. I find from uncontradicted testimony of the three and admissions of Personnel Director Tim W. Turner that they had satisfactory work records up to their discharge, without recent specific warnings or reprimands on their records, and at the discharge Tim W. Turner emphasized that he had the responsibility to give them proper recommendations on their records on inquiry from future employers. Turner, Jr., admitted he was in a dilemma when called on to choose drivers for discharge, because all were satisfactory in their work. Hence, the choice was left to Warehouse Manager Jim Polston. According to Tim Turner, Polston selected the above three because of their "very negative" attitude since their December layoff. None of the three Turners could explain that "attitude," and Respondent did not call Polston to explain it, although he dealt directly with drivers and hence was given the responsibility for selecting three for discharge. The failure to produce Polston to substantiate the given reason warrants the inference, of course, that he would not have been able to support Respondent's claim with sworn testimony,[8] or that it might have been adverse to that claim. Since the only remaining factor differentiating the three from other drivers, according to the record, is their open activity

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[8] *Gibbs Die Casting Aluminum Corp.*, 174 NLRB 75, and cases cited at page 80.

for the Teamsters Union after their recall from layoff, an activity which Respondent has always strongly disliked in its employees, I can only infer that this activity was the "negative attitude" which company officials had in mind, when making the layoff choice.

While company officials testified without contradiction that seniority has never played any part in the layoff or discharge of employees, they did not credibly deny that it was a factor in work assignments or other supervision of drivers. They do not explain why, as professed prudent managers of a publicly-owned company, they chose to lose three drivers of long experience with satisfactory records,[9] while keeping two drivers of only a few month's experience (Morris, hired June 19, 1972, and Garner, hired March 21, 1972) and hiring a new man, Ethridge, on August 14, 1972, without trying to recall any of the three more experienced dischargees. This does not appear to be the action of company managers operating in an efficient manner under stockholder pressure. Nor do they try to justify on efficiency grounds their retention of Morris after he had wasted almost a day of company time and money in July 1972, by hauling the wrong trailer on a long trip and being compelled to return it and take the right one out, and then assigning him within a week thereafter to a preferred job as trainee on a sleeper truck with Isenberg.[10] In addition, I find from credible testimony of Billingsley, Hurt and Isenberg that Respondent has a policy of considering longevity in assigning new trucks to drivers, and also in assigning drivers to

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[9] Billingsley was hired in February 1967, and worked steadily until his 1971 layoff, with recall 2 months later. Isenberg was hired in October 1966, and worked steadily until the 1971 layoff, with recall one month later. Hurt was hired in June, 1970, and worked steadily until the 1971 layoff, with recall 2 months later. Billingsley received a special no-accident bonus for 1970 and 1971, Hurt received it for 1971, and Isenberg for 1970.

[10] I find the facts as to Morris from uncontradicted testimony of Hurt and Isenberg. Morris did not testify.

sleeper trucks, yet Respondent does not explain why it deviated from this policy in letting the new but questionable driver, Morris, train on a sleeper truck.[11]

In argument Respondent relies on uncontradicted testimony that Billingsley had received in 1970 two reprimands for violations of Interstate Commerce Commission driving regulations, plus a notation in his record of a violation of a traffic ordinance against speeding. While one reprimand specifically warned Billingsley that further violations would result in discharge, there is no proof that the violations were repeated, and the derelictions of 1970 apparently did not weigh effectively in Respondent's later appraisal of his performance, for they admittedly were not used in his random choice for layoff in 1971, nor did they hinder his recall early in 1972. There is no proof that they were part of the nebulous "negative attitude" proffered by Respondent as the reason for discharge. The offer of and reliance upon a remote or obviously irrelevant dereliction as a defense is another factor weighing against the credibility of the claim of discharge for cause,[12] and warrants the inference that the true reason is being concealed.

Considering all the pertinent facts and circumstances pro and con, and appraising Respondent's overall defense, including its failure to adduce credible and persuasive proof of the crucial "negative attitude" of the 3 dischargees on which it relies, plus its other implausible and shifting arguments, I am constrained to conclude that Respondent has not sustained its burden of going forward with cogent and substantial evidence

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[12] *N.L.R.B. v. Joseph Antell, Inc.*, 358 F.2d 880, 883 (C.A. 1).

[11] Cal Turner, Jr., testified the main consideration for choice of a second driver on a sleeper was his compatability with the main driver, but then admits this was only one, though an overriding factor. He does not try to explain or defend the choice of Morris to ride with Isenberg, or the circumstances under which he was chosen, and no direct supervisor, like Polston, is called by Respondent to do so.

of discharge motivated in whole or main by good cause which is adequate to rebut the *prima facie* case of discriminatory discharge adduced by General Counsel, and that on the entire record General Counsel has sustained his ultimate burden of proof that Respondent chose Billingsley, Hurt and Isenberg for discharge on July 7, 1972, because of their continued adherence to and activity on behalf of one of the Unions. I find and conclude that by such discharges Respondent coerced employees in exercise of rights guaranteed to them by Section 7 of the Act and discriminated in regard to the hire and tenure of employees in order to discourage membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act.[13]

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section II, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully discharged Otis J. Hurt, Jr., Marvin Billingsley and Kenneth C. Isenberg on July 3, 1972, I shall recommend that it offer each of them immediate reinstatement in the usual

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[13] This conclusion makes it unnecessary to analyze or make findings on other events noted in the record, on which both parties rely in arguments.

manner, with backpay to be computed under the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, with proper interest added, *Isis Plumbing & Heating Co.*, 138 NLRB 716. Since unlawful discharge of employees is conduct striking at the fundamental purposes of the Act, I shall also recommend a broad cease and desist order.

Conclusions of Law

1. Respondent is an employer engaged in commerce, and the Unions are labor organizations, within the meaning of the Act.

2. By its unlawful discharge of Marvin Billingsley, Otis J. Hurt, Jr., and Kenneth C. Isenberg, thereby discriminating in regard to hire and tenure of employees in order to discourage membership in labor organizations, and also interfering with, restraining and coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices affecting commerce in violation of Sections 8(a)(1) and 8(a)(3) and 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[14]

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[14] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, Dollar General Corporation, of Scottsville, Kentucky, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or in any other manner discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment in order to discourage membership in a labor organization.

(b) By the above conduct or in any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them under Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer to Marvin Billingsley, Otis J. Hurt, Jr. and Kenneth C. Isenberg immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to seniority or other rights and privileges previously enjoyed by them, and make each whole for any loss of pay suffered by him as a result of Respondent's discrimination against him, in the manner set forth in the section hereof entitled "the Remedy."

(b) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records relevant and necessary to a determination of the right of reinstatement and the amount of

backpay due, as provided under the terms of this recommended Order.

(c) Post at its Scottsville, Kentucky facility and place of business, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being duly signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps should be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated at Washington, D. C. Mar. 14, 1973.

EUGENE F. FREY
Administrative Law Judge

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[15] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

204 NLRB No. 106

D-7629
Scottsville, Ky.

United States of America
Before the National Labor Relations Board

Dollar General Corporation

and

Case No. 9-CA-7168

Marvin Billingsley, an Individual

DECISION AND ORDER

(Dated June 27, 1973)

On March 14, 1973, Administrative Law Judge Eugene F. Frey issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief, and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Dollar General

Corporation, Scottsville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. June 27, 1973.

EDWARD B. MILLER, Chairman
HOWARD JENKINS, JR., Member
RALPH E. KENNEDY, Member
National Labor Relations Board

(Seal)

No. 73-1784

United States Court of Appeals
for the Sixth Circuit

Dollar General Corporation,
Petitioner,
v.
National Labor Relations Board,
Respondent.

ORDER

(Filed April 5, 1974)

Before: Phillips, Chief Judge, Miller, Circuit Judge, and McAllister, Senior Circuit Judge.

This is a petition for review by Dollar General Corporation, of Scottsville, Kentucky, and a cross-petition for enforcement of an order of the National Labor Relations Board, finding the company guilty of violating Sec. 8(a)(1) and 8(a)(3) of the Na-

tional Labor Relations Act in Discharging employees Billingsley, Hurt, and Isenberg. The Board adopted the findings of the administrative law judge to the effect that these employees were discharged because of anti-union motives on the part of the company and because of the employees' union activities. 204 NLRB No. 106.

In two prior cases, the Board found that the company had committed unfair labor practices at the Scottsville location. 189 NLRB 301.

In September 1969, three months after the last discharge for union activities, the company drivers began to discuss union organization. The company responded by interrogating them about these meetings, and warning them they would be fired if they did not stop their organizational activities. Shortly after the three drivers were discharged, the Board found that the discharge of the three employees violated Sec. 8(a)(1) of the Act by coercing the employees in their statutory right to self organization, and violated Section 8(a)(3) of the Act by discriminating in employment in order to discourage membership in a labor organization.

The Board entered a cease and desist order, and further ordered the company to offer the three employees immediate and full reinstatement in their former or substantially equivalent positions, and to make them whole for any loss of earnings resulting from the discrimination and to post the usual notices.

On an examination of the record, we find the order of the Board supported by substantial evidence on the record as a whole. The order of the National Labor Relations Board is, therefore, enforced.

Entered by Order of the Court.

JOHN P. HEHMAN
Clerk

No. 73-1784

United States Court of Appeals
for the Sixth Circuit

Dollar General Corporation,
Petitioner,

v.

National Labor Relations Board,
Respondent.

ORDER

(Filed May 2, 1974)

Before: Phillips, Chief Judge, Miller, Circuit Judge, and McAllister, Senior Circuit Judge.

The Court has fully considered the petition for rehearing filed by Petitioner on April 12, 1974, and being of the opinion that the said petition is without merit,

It is hereby denied.

Entered by Order of the Court.

/s/ JOHN P. HEHMAN
Clerk

APPENDIX B

National Labor Relations Act, Section 8, 29 U.S.C. Sec. 158.

(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

National Labor Relations Act, Section 10, 29 U.S.C. Sec. 160.

. . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board

such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Fifth Amendment to the Constitution of the United States.

No person shall . . .

. . . be deprived of life, liberty or property without due process of law . . .

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1905

DOLLAR GENERAL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The court of appeals did not issue an opinion. The decision and order of the National Labor Relations Board (Pet. App. 19-36) are reported at 204 NLRB No. 106.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1974 (Pet. App. 36-37). The company's petition for rehearing was denied on May 2, 1974 (Pet. App. 38). The petition for a writ of certiorari was filed on June 20, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the company violated

Section 8(a)(3) and (1) of the National Labor Relations Act by discharging three employees because of their union activities.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 39-40.

STATEMENT

A. The Board's Findings of Fact

Petitioner Company employs approximately 20 truck drivers at its warehouse-distribution facility in Scottsville, Kentucky (Pet. App. 20-21, 26, n. 6; A. 3, 6, 39, 54).[1] In June 1969, the Company discharged office employee Barbara Mayes because she was observed in a Scottsville restaurant complaining to a union representative about working conditions.[2] In September 1969, the Company's drivers launched a union campaign and the Company responded with employee interrogations and threats. On November 30, 1969, 9 or 10 drivers held a meeting at a local church known as the "Tabernacle" to discuss employee response to the discharge, the previous day, of an employee active in the union campaign. This meeting was under surveillance by a supervisor who was the son-in-law of the Company president. Shortly thereafter, the Company discharged four other employees who attended the November 30 meeting. On March 25, 1971, the Board found that the Company's interrogations, threats, surveillance, and discharges during the September-November 1969 campaign violated Section 8(a)(3) and (1) of the Act.[3]

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[1] "A." refers to the appendix to the briefs in the court below.

[2] On March 3, 1970, the Board found that this discharge violated Section 8(a)(3) and (1) of the Act. See 189 NLRB at 302.

[3] 189 NLRB 301, 305, 311-312.

The present case arises from a union campaign which was initiated in November 1971.[4] During that month, driver Otis J. Hurt, Jr., began soliciting for Local 89, International Brotherhood of Teamsters, in drivers' homes, Scottsville restaurants, and on Company property. (Pet. App. 22; A. 53-54, 56). Pursuant to this solicitation, drivers Marvin Billingsley and Kenneth C. Isenberg signed union authorization cards (Pet. App. 22; A. 43, 62). Both Billingsley and Isenberg had attended the November 30, 1969 meeting which was the subject of the Company's illegal surveillance (Pet. App. 22; A. 41-42, 47, 61-62).

On December 20, 1971, Hurt, Billingsley, and Isenberg were temporarily laid off for lack of work, but were recalled by February 24, 1972 (Pet. App. 22; A. 50-51). After recall, Hurt, Billingsley, and Isenberg continued openly to urge other drivers to join the Union, soliciting them at the shop and at restaurants frequented by the drivers (Pet. App. 22; A. 45-46, 56, 62-63).

On June 1, 1972, the court of appeals issued its judgment enforcing the Board's order requiring reinstatement of the 5 employees who had been fired because of their activities in the September-November 1969 union campaign.[5] Thereupon, the Company offered the 1969 discriminatees reinstatement and, on July 3, 1972, this offer was accepted by three of them (Pet. App. 23; A. 70-71). On July 7, 1972, Personnel Director Tim Turner called Hurt, Billingsley, and Isenberg into his office and handed each a letter that noted the reinstatement order and stated, "Because of this action by the Labor Board, the company is now termi-

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[4]The Board in the present case took official notice of the two prior Board proceedings against the Company.

[5]*National Labor Relations Board* v. *Dollar General Corporation*, 489 F. 2d 733 (C.A. 6).

nating your job" (Pet. App. 24; A. 77-79). Turner added orally that their work was satisfactory and that he would give them favorable job recommendations if they desired (Pet. App. 23-24; A. 38, 57, 64).

According to Company Vice President Cal Turner, Jr., since the reinstatement order left the Company with more drivers than trucks, he decided to terminate three other drivers to make room for the 1969 discriminatees. After discussion with Warehouse Manager Polston and Personnel Director Tim Turner, Cal Turner, Jr., allegedly concluded that Hurt, Billingsley, and Isenberg had exhibited a "negative attitude" since their recall and therefore they would be discharged (Pet. App. 23; A. 70-71). Tim Turner testified, however, that he had no knowledge of this alleged bad attitude; Polston did not testify at the Board hearing (Pet. App. 28; A. 36). Moreover, on June 19, 1972, after the Company had received notice of the court's reinstatement order, it hired a new driver, Morris (Pet. App. 29; A. 49). And, by September 1, 1972, the Company had lost three drivers and hired another new driver (Pet. App. 27; A. 49-51), but it never sought to recall Hurt, Billingsley, or Isenberg (Pet. App. 24).

B. The Decisions Below

The Administrative Law Judge found that the Company's background of anti-union animus, coupled with its precipitate discharge of three known union activists shortly after its receipt of the reinstatement order, provided *prima facie* evidence that this discharge was discriminatorily motivated (Pet. App. 25-26). He also found that the record failed to support the Company's contention that economic necessity required the discharge of three drivers to make room for the employees reinstated on July 3, 1972, and that the only evidence concerning the "negative attitude" of Hurt, Billingsley, and Isenberg after their recall was

that they were openly and actively pro-union during that period (Pet. App. 26-31). Accordingly, based on the entire record, the Administrative Law Judge concluded that these employees were discharged in violation of Section 8(a)(3) and (1) of the Act (Pet. App. 31).

The Board adopted the decision of the Administrative Law Judge. It ordered the Company to cease and desist from the unfair labor practices found, to reinstate the three discriminatees and make them whole for losses suffered, and to post appropriate notices. (Pet. App. 33-35.) The court of appeals found that the Board's decision was supported by substantial evidence and enforced its order (Pet. App. 36-37).

ARGUMENT

The only issue presented by this petition is whether substantial evidence supports the Board's finding, sustained by the court below, that Hurt, Billingsley, and Isenberg were discharged because of their union activities. Such an evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 487-488; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502. In any event, there is no substance to the Company's claim (Pet. 11, 14) that the Board based its findings in the instant case solely on the discriminatory discharges found in the previous cases. The Administrative Law Judge, whose findings were adopted by the Board, carefully considered all the evidence presented, including the Company's defenses, which did not withstand scrutiny and indeed served only to buttress the strong *prima facie* evidence of discrimination adduced by the General Counsel (Pet. App. 25-31). Nor did he err in viewing the facts in the instant case against the background of peti-

tioner's previous, similar unfair labor practices. It is well settled that prior unfair labor practices are relevant in determining the motivation underlying subsequent conduct. See *National Labor Relations Board* v. *Monroe Auto Equipment Co., Hartwell Division*, 420 F. 2d 861, 862-863 (C.A. 5), certiorari denied, 399 U.S. 927; *Maphis Chapman Corp.* v. *National Labor Relations Board*, 368 F. 2d 298, 300, 303-304 (C.A. 4).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

ROGER T. BRICE,
Attorney,
National Labor Relations Board.

SEPTEMBER 1974.

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[6]The Company's contention that the court below confused the facts of this case with the prior cases involving it (Pet. 9-10) was presented to the court below in a petition for rehearing. The court denied the petition as lacking in merit (Pet. App. 38).